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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 794

FRED W. BURDETTE, SR.,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee

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St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee, entered and filed on December 13, 1968, has not been designated for publication, but a copy of the same may be found as Appendix B on page 22 of the Petition. The orders of the Supreme Court of Tennessee, which denied certiorari on April 21, 1969, and a petition to rehear the denial of certiorari on June 16, 1969, are unreported but are contained in the record (R. 116, 118).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, the respondent directs attention to the fact that the Petition seeks a writ of certiorari

directed to the Supreme Court of Tennessee while this cause remains in the Court of Criminal Appeals of Tennessee, as the Supreme Court of Tennessee refused to issue a writ of certiorari to the Court of Criminal Appeals. Therefore, the respondent respectfully submits that the Petition seeks the writ of certiorari directed to the improper court.

While the jurisdictional requisites are adequately set forth in the Petition, the respondent denies that the requirements for invoking the jurisdiction of this Court on the question presented by the Petition have been met, as this question has not been properly presented to the courts of Tennessee.

QUESTIONS PRESENTED

The respondent is dissatisfied with the presentation of the question by the Petition and, pursuant to **Rule 40(3)** of the Supreme Court Rules, presents the questions as follows:

I. Did the petitioner properly present to the Tennessee courts the question of whether the petitioner's plea of guilty was accepted without the trial judge first affirmatively determining on the record that such a plea had been made intelligently and voluntarily?

II. Should the rule set forth by this Court in **Boykin v. Alabama**, 395 U. S. 238, decided June 2, 1969, be given retroactive application?

III. Is the examination of the petitioner in open court, while represented by privately retained counsel, a record which fails to disclose that the petitioner voluntarily and understandingly entered his plea of guilty?

STATUTES INVOLVED

Section 39-602 of **Tennessee Code Annotated** provides:

"If any person assault another, with intent to commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500.00)."

Section 39-604 of **Tennessee Code Annotated** provides:

"Whoever shall feloniously and with malice aforethought assault any person, with the intent to commit murder in the first degree, or shall administer or attempt to give any poison or potion for that purpose, though death shall not ensue, shall, on conviction, be imprisoned in the penitentiary not less than three (3) nor more than twenty-one (21) years."

Section 39-605 of **Tennessee Code Annotated** provides:

"Any person guilty of committing an assault and battery upon any female of the age of twelve (12) years or upwards, with an intent, forcibly and against her will, to have unlawful carnal knowledge of her, shall, on conviction be imprisoned in the penitentiary not less than ten (10) years nor more than twenty-one (21) years."

Section 39-109 of **Tennessee Code Annotated** provides:

"All persons present, aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders, and punished as such."

STATEMENT OF THE CASE

On July 21, 1967, Mrs. Faye Jarrell Esposito was taken by the petitioner to his son's house, so she could assist the petitioner and his son in preparing some mail in connection with their business. During the next three to four hours, Mrs. Esposito suffered numerous indignities at the hands of the petitioner's son, Fred W. Burdette, Jr., including being forced to disrobe and lay on a bed beside Burdette, Jr., being slapped and mauled on numerous occasions, and being lewdly propositioned continually. During this entire episode, the petitioner's son was armed with, and threatened the victim with, a loaded pistol.

The petitioner, who had left the house after bringing Mrs. Esposito, returned later while the victim and his son were in the bedroom. The petitioner had brought some whiskey and wine, and told Mrs. Esposito that everything would be all right when she asked the petitioner to help her get home. However, at this time, the petitioner only witnessed his son threaten to kill Mrs. Esposito if she did not drink some beer and wine, but left again before his son forced the victim to disrobe and lay on the bed with him.

After the incident in the bedroom, the victim was allowed to put her clothes back on and called the petitioner at the direction of his son. The petitioner returned, left again to purchase some cigarettes for his son, and returned again with the cigarettes. The petitioner remained this time and again witnessed his son commit various indignities upon Mrs. Esposito. After Mrs. Esposito declined to accompany Burdette, Jr., to the bathroom, the petitioner held the gun on Mrs. Esposito and watched her at the request of his son.

While his son was in the bathroom, the petitioner refused to allow Mrs. Esposito to leave despite her pleas to him for assistance. The petitioner continued to hold the gun on her after his son returned to the room, sat beside Mrs. Esposito on the couch, and proposed different ways for them to have sexual relations. The refusal of Mrs. Esposito to accede to the suggestions of Burdette, Jr., angered him, and he kicked her and told the petitioner to get some rope so he could tie up Mrs. Esposito.

Upon receiving instructions from his son to obtain some rope, the petitioner left the house and did not return. After suffering some more at the hands of Burdette, Jr., Mrs. Esposito eventually made good her escape through a back door of the house, swam fully clothed to a boat dock on the lake behind the house, and was assisted by a man on the boat dock.

On August 25, 1967, the petitioner, his son and Joe Crawford were jointly indicted for assault and battery with intent to have carnal knowledge of Mrs. Esposito and for assault with intent to commit first degree murder of Mrs. Esposito. Joe Crawford, a handyman who worked for the Burdettes and who was present during some of the incidents on July 21, 1967, was granted a severance and was to testify for the State against the Burdettes.

When the case was called for trial on January 15, 1968, the petitioner and his son entered pleas of guilty, after an agreement was negotiated between their retained counsel and the late General Porter. The Trial Court examined the petitioner and his son, with their attorney, in open court before the jury as set forth on pages 6 and 7 of the Petition. After some hesitation, the jury accepted the recommendation of the State, and the petitioner was found guilty of assault with intent to commit a felony and was sen-

tenced to serve eleven (11) months and twenty-nine (29) days in the county jail.

The opinion of the Court of Criminal Appeals of Tennessee correctly details what happened with regard to petitioner's case after his conviction and sentencing, and counsel for the respondent respectfully submits that any further summary of these appellate incidents would be needless repetition.

ARGUMENT

I

The respondent respectfully submits that the issue presented by the Petition has not previously been properly presented to the Tennessee courts. In order to support this contention of respondent, it will be necessary to detail and discuss the issues presented by the petitioner to the Tennessee courts.

The errors assigned and argued on behalf of the petitioner before the Court of Criminal Appeals, the first seven of which were those assigned in the petitioner's Motion for a New Trial, were as follows:

> "I. The evidence preponderates against the judgment of the Court and in favor of the innocence of the defendant.
>
> II. There is no evidence to support the verdict of the jury and the judgment of the Court in this cause.
>
> III. The defendant was an unwilling aider and abettor, if in fact he was an aider and abettor at all, he being forced and coerced at gunpoint to take the action which he took.
>
> IV. The defendant pretended to lend no assistance to the prosecuting witness in order to save his own life and that of the prosecuting witness.
>
> V. Knowing the state of mind of his son at the time, the defendant was placed in a frightening position which required that he act with great caution so as not to alarm his son, who was drunk or crazy at the time, which action on his part did, in fact, prevent a great tragedy, as borne out by the evidence adduced at the preliminary hearing.

VI. The defendant entered a plea of guilty in order to obtain a smaller sentence for his son notwithstanding the fact that he was not guilty of any intentional wrongdoing.

VII. All of the evidence adduced at the preliminary hearing, a copy of which is made an exhibit to this Motion by reference, shows without question that the defendant had no intention of harming the prosecuting witness and was helpless to assist her in the attack on her by his son.

VIII. The Court erred in refusing to permit Burdette, Sr., to make the record of the preliminary an exhibit to his Motion for a New Trial.

IX. The Court erred in refusing to allow Burdette, Sr. to appeal."

These same errors were urged upon the Supreme Court of Tennessee in the petitioner's Petition for a Writ of Certiorari to that court. The first time the petitioner substantially alleged the error now urged upon this court was in his Petition to Rehear Petition for Certiorari, where it was alleged:

"Petitioner would respectfully show to this Honorable Court that he was required to enter a plea of guilty under coercion; that his plea of guilty was not freely and voluntarily made; and further, that this fact was made known to the trial judge, in open Court, by the District Attorney, for the Nineth [sic] Judicial Criminal Court (Sumner County)."

The petitioner recognized that this allegation was being presented for the first time in his Petition to Rehear Petition for Certiorari, as he admitted, *inter alia*, that:

"Petitioner would further state to this Honorable Court that it is admitted that the petition which was first made in his behalf was admittedly void of any

issue which could justify this Honorable Court taking any action other than that of denying his petition, for all of which his attorney accepts full responsibility; however, it is believed, after the aid of additional time, that your petitioner has presented to this Honorable Court an issue, in proper form, sufficient to grant him a hearing, and after presentation of law, the relief to which it is respectfully submitted, he is justly entitled."

The Supreme Court of Tennessee could not, of course, consider this issue, because it had not been raised before by the petitioner in the Trial Court or the Court of Criminal Appeals. **Rules 12, 14 and 15** of the **Tennessee Supreme Court Rules, Vol. 218** of **Tenn. Reports.** In addition, the proposed consideration of this issue by the Supreme Court of Tennessee posed on another problem, since the petitioner relied on evidence which had never been presented to either the Court of Criminal Appeals or the Supreme Court in Tennessee.

In support of this new issue in his Petition to Rehear Petition for Certiorari, the petitioner relied almost exclusively, as indeed he does before this Court, on certain statements of the late General James M. Porter, the District Attorney-General who prosecuted the case for the State of Tennessee. General Porter made these statements during the oral arguments on the petitioner's Motion for a New Trial. The transcript of these arguments, which has been filed with this Court by the petitioner, was never even offered for filing, much less filed, in any court in the State of Tennessee.

Therefore, this issue was not only improperly raised in the Tennessee courts, but the evidence relied upon in support of this issue had not been presented to the Tennessee courts. Because the petitioner failed to properly raise this federal question below and failed to properly present the evidence relied on in support of this issue, the respondent

suggests that this Court lacks jurisdiction to review this issue. **Cardinale v. Louisiana**, 394 U. S. 437 (1969); **N. A. A. C. P. v. Alabama ex rel. Patterson**, 357 U. S. 449, 466-467 (1958); **Michel v. Louisiana**, 350 U. S. 91, 101-102 (1955); **Beauharnais v. Illinois**, 343 U. S. 250, 264-265 (1952). Finally, the respondent submits that this question can be properly presented in the Tennessee courts by use of Tennessee's Post-Conviction Procedure Act. **Section 40-3801 et seq.** of the **Tennessee Code Annotated.**

II

If this Court decides that the issue presented by the Petition was properly presented to the Tennessee courts, then respondent respectfully urges that the rule announced in **Boykin v. Alabama**, 395 U. S. 238, decided June 2, 1969, be given prospective application. As indicated by Mr. Justice Harlan in his dissent from the majority decision in **Boykin**, the effect of the rule announced in **Boykin** upon the several States' criminal procedure is similar to the effect upon federal criminal procedure occasioned by the decision of this Court in **McCarthy v. United States**, 394 U. S. 459 (1969).

The **McCarthy** case was decided on April 2, 1969, and in **Halliday v. United States**, 394 U. S. 831 (1969), this Court declined to apply **McCarthy** retroactively, thus limiting its application to those defendants whose guilty pleas were accepted after April 2, 1969. The respondent respectfully submits that the reasons for limiting **McCarthy** to prospective application are at least as equally significant and persuasively determinative for the same application of **Boykin**. Therefore, the rule announced in **Boykin** on June 2, 1969, would not apply to the acceptance of the petitioner's plea of guilty on January 15, 1968. However, the petitioner could question the voluntariness of his plea through the use of Tennessee's Post-Conviction Procedure Act. **Sections 40-3801 et seq.** of **Tennessee Code Annotated.**

III

If this Court decides that the issue raised by the Petition was properly presented to the Tennessee courts and that **Boykin** is to be applied retroactively, then respondent respectfully submits that the record in the case at bar discloses that the defendant voluntarily and understandingly entered his plea of guilty.

While admitting that the record herein is not silent as in **Boykin**, the petitioner dismisses the examination of the petitioner and his retained counsel as cursory and superficial. The petitioner insists that because of the father-son relationship between the petitioner and his co-defendant and because of the petitioner's questionable guilt, the trial judge should not have relied on the petitioner's mere acceptance of the agreement bargained for and obtained by his attorney. Rather, the petitioner contends that the trial judge should have challenged his attorney's management of the lawsuit by examining the petitioner at length in an effort to insure that he was receiving the effective legal representation for which he was paying. If this is what **Boykin** requires, under what circumstances, if any, may trial judges presume defense attorneys are acting in the best interests of their clients?

In an effort to psychologically strengthen his contention his plea of guilty was not made voluntarily and intelligently, the petitioner suggests his "peripheral" involvement in the events of July 21, 1967, establishing an excellent possibility that he succumbed to the inherently coercive effect of his desire to obtain leniency for his son by acceding to the demands of the prosecution and pleading guilty to a crime for which the evidence would not establish his guilt. While hesitant to argue the effect of the evidence in a criminal case to this Court, respondent feels compelled to take issue with the peti-

tioner's suggestion that he could not be properly found guilty of assault with the intent to commit a felony.

The respondent suggests the lack of merit in the petitioner's contention that he could not be found guilty of assault with the intent to commit a felony is best exposed by an examination of the petitioner's probable success on direct appeal after a complete trial, with the evidence heretofore detailed being presented to a jury, which convicts him of this crime as a lesser included offense under the count of the indictment charging him with assault and battery with the intent to have carnal knowledge. **Strader v. State**, 210 Tenn. 669, 362 S. W. 2d 224 (1962); **Clark v. State**, 214 Tenn. 555, 381 S. W. 2d 898 (1964). In view of the petitioner's assistance of his son, his failure and refusal to use the pistol in his possession to restrain his son instead of Mrs. Esposito and his failure to summon assistance for Mrs. Esposito during any of his absences from the domination and fear producing influence of his son, respondent submits the petitioner would be unable to convince the Court of Criminal Appeals or the Supreme Court of Tennessee to reverse his conviction because of a lack of evidence. In Tennessee, the verdict of the jury, approved by the trial judge, accredits the testimony of witnesses supporting the verdict, resolves all conflicts in favor of the theory of the State, displaces the presumption of innocence and raises a presumption of guilt, so that a conviction will not be reversed on the facts unless it is shown by the Defendant that the evidence preponderates against the verdict and in favor of his innocence. **McBée v. State**, 213 Tenn. 15, 372 S. W. 2d 173 (1963); **Schweizer v. State**, 217 Tenn. 569, 399 S. W. 2d 743 (1966); **Pryor v. State**, 217 Tenn. 695, 400 S. W. 2d 700 (1966).

In addition to suggesting his innocence, the petitioner contends that the late General Porter took advantage of

the petitioner's concern for his son by insisting that both the petitioner and his son plead guilty. The respondent submits General Porter clearly explained his reasons for accepting the compromise proposed by the petitioner's attorney in his statement to the jury (R. 28, 34-36). A mere perusal of the reasons given by General Porter clearly indicates that they are only valid and logical if the State does not have to try either defendant. It just does not make sense for the State to accept a compromise for the petitioner's son, while being compelled to try the petitioner upon the same evidence.

CONCLUSION

As the Petition presents no question which merits this Court's review upon a writ of certiorari, the respondent respectfully submits that this Petition for a writ of certiorari be denied.

Respectfully submitted

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Attorneys for Respondent

Certificate of Service

I, Thomas E. Fox, Deputy Attorney General of the State of Tennessee, one of the attorneys for the respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of

March, 1970, I served a copy of the within Brief in Opposition to the Petition for Writ of Certiorari on Fred W. Burdette, Sr., Petitioner, by mailing said copy in a duly addressed envelope, postage duly paid, to counsel of record, Lawrence J. Bernard, Jr., Esquire, Pierson, Ball & Dowd, 1000 Ring Building, Washington, D. C. 20036.

Thomas E. Fox
Deputy Attorney General
State of Tennessee